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IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1985

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ALVIN BERNARD FORD, OR CONNIE FORD,  
individually, and as next friend  
on behalf of ALVIN BERNARD FORD,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,  
Department of Corrections,

Respondent.

---

ON WRIT OF CERTIORARI TO  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

MOTION FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF  
AND  
BRIEF OF THE OFFICE OF  
THE CAPITAL COLLATERAL  
REPRESENTATIVE ET AL.

SANFORD L. BOHRER  
(Counsel of Record)  
THOMSON ZEDER BOHRER WERTH  
ADORNO & RAZOOK  
4900 Southeast Financial Center  
200 South Biscayne Boulevard  
Miami, Florida 33131  
(305) 350-7200

Attorney for Amici Curiae

85 pp

## TABLE OF CONTENTS

	<u>Page</u>
MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE. . . . .	ii
TABLE OF AUTHORITIES. . . . .	
THE INTERESTS OF THE OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE FOR THE STATE OF FLORIDA ET AL. . . . .	1
FACTS . . . . .	8
SUMMARY OF ARGUMENT . . . . .	8
ARGUMENT. . . . .	13
CONCLUSION. . . . .	58
APPENDIX I . . . . .	59
APPENDIX II . . . . .	66
CERTIFICATE OF SERVICE . . . . .	72

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MOTION OF THE OFFICE OF  
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REPRESENTATIVE ET AL. FOR  
LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 36.3 of the  
Rules of this Court, the Office of the

Capital Collateral Representative for the State of Florida (hereafter "CCR"), the Mental Health Association of Florida (hereafter "MHFA"), the National Mental Health Association, SHARE of Daytona Beach, Florida, the Montana Mental Health Consumers Advocacy Project, On Our Own, Inc., the Mental Patients' Association of New Jersey, and the Mental Patients' Association of Philadelphia move for leave to file the attached brief as amici curiae.

The reasons supporting the granting of this motion and the issues which amici are uniquely qualified to address are set forth in the statement of interest of amici in the attached brief.

Petitioner has consented to the filing of this brief, and his letter

is being filed with the Clerk of this Court. Consent was requested of respondent, but was denied. Amici respectfully submit that they have important, relevant, and expert information to contribute to the Court that will be useful in deciding this case, and that will not be provided by the parties.

Respectfully submitted,

Sanford L. Bohrer  
SANFORD L. BOHRER

(Counsel of Record)

THOMSON ZEDER BOHRER WERTH

ADORNO & RAZOOK

4900 Southeast Financial Center

200 South Biscayne Boulevard

Miami, Florida 33131

(305) 350-7200

Attorney for Amici Curiae

January 30, 1986

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>Ake v. Oklahoma</u> , 470 U.S. _____, 105 S. Ct. 1087 (1985) .....	42, 43, 44, 45, 56, 57
<u>Arnett v. Kennedy</u> , 416 U.S. 134 (1974) .....	56
<u>Bell v. Burson</u> , 402 U.S. 535 (1971) .....	21, 33
<u>Bingham v. State</u> , 82 Okla. Crim. 305, 169 P.2d 311 (Okla. Crim. App. 1946) .....	36
<u>Board of Regents v. Roth</u> , 408 U.S. 564 (1972) .....	21
<u>Bulger v. People</u> , 61 Col. 187, 156 P. 800 (Colo. 1916) .....	57
<u>Caritativo v. California</u> , 357 U.S. 549 (1958) .....	39, 41
<u>Chandler v. Florida</u> , 449 U.S. 560 (1981) .....	31
<u>Davidson v. Commonwealth</u> , 174 Ky. 789, 192 S.W. 846 (Ky. 1917) .....	39, 40
<u>Escoe v. Zerbst</u> , 295 U.S. 490 (1935) .....	20
<u>Ex parte Chesser</u> , 93 Fla. 291, 111 So. 720 (Fla. 1927) .....	17

<u>CASES</u>	<u>Page</u>
<u>Ford v. Wainwright</u> , 752 F.2d 526 (11th Cir. 1985), <u>reh'g en</u> <u>banc denied</u> , 765 F.2d 154 (11th Cir. 1985), <u>cert.</u> <u>granted</u> , 106 S.Ct. 566, 88 L.Ed.2d 552 (1985) .....	13
<u>Ford v. Wainwright</u> , 451 So. 2d 471 (Fla. 1984) ....	13
<u>Garcia v. San Antonio Metro</u> <u>Transit Authority</u> , 470 U.S. _____, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) .....	32
<u>Gardner v. Florida</u> , 430 U.S. 349 (1977) .....	10, 22, 23, 48
<u>Goldberg v. Kelly</u> , 397 U.S. 254 (1970) .....	20, 35, 36, 43, 47, 51, 52
<u>Goode v. Wainwright</u> , 448 So.2d 999 (Fla. 1984) .....	14, 48
<u>Goss v. Lopez</u> , 419 U.S. 565 (1975) .....	21
<u>Greenholtz v. Inmates of</u> <u>Nebraska Penal and</u> <u>Correctional Complex</u> , 442 U.S. 1 (1979) .....	22
<u>Hays v. Murphy</u> , 663 F.2d 1004 (10th Cir. 1981) .....	40

<u>CASES</u>	<u>Page</u>
<u>Heath v. Alabama</u> , 106 S.Ct. 433, 88 L.Ed.2d 387 (1985) .....	10, 26, 27, 28, 29, 30, 31
<u>Hysler v. State</u> , 136 Fla. 563, 187 So. 261 (1939) .....	17, 21
<u>Morrissey v. Brewer</u> , 408 U.S. 471 (1972) .....	21, 32, 33, 51, 52
<u>New State Ice Co. v. Liebmann</u> , 285 U.S. 262 (1932) .....	32
<u>Nobles v. Georgia</u> , 168 U.S. 398 (1897) .....	23, 50
<u>People v. Riley</u> , 37 Cal. 2d 510, 235 P.2d 381 (Cal. 1951) .....	37
<u>Perkins v. Mayo</u> , 92 So.2d 641 (Fla. 1957) .....	17, 21
<u>Phyle v. Duffy</u> , 334 U.S. 431 (1948) .....	23
<u>Shapiro v. Thompson</u> , 394 U.S. 618 (1969) .....	20
<u>Solesbee v. Balkcom</u> , 339 U.S. 9 (1950) .....	<u>passim</u>
<u>State v. Cunningham</u> , 102 Miss. 237, 59 So. 76 (Miss. 1912) .....	27

<u>CASES</u>	<u>Page</u>
<u>State v. Federanko</u> , 26 N.J. 119, 139 A.2d 30 (N.J. 1958) .....	27
<u>State v. Holden</u> , 46 N.J. 361, 217 A.2d 132 (N.J. 1966) .....	27
<u>Sullivan v. Askew</u> , 348 So.2d 312 (Fla. 1977), <u>cert. denied</u> , 434 U.S. 878 (1977) .....	16
<u>Ughbanks v. Armstrong</u> , 208 U.S. 481 (1908) .....	20
<u>Welsh v. State</u> , 126 Ind. 71, 25 N.E. 883 (Ind. 1890) .....	27
<u>Williams v. New York</u> , 337 U.S. 241 (1949) .....	9, 22, 23
<u>Wolff v. McDonnell</u> , 418 U.S. 539 (1974) .....	21, 47, 51, 54

## STATUTES

Ala. Code § 15-16-23 (1982) ...	28
Ark. Stat. Ann. § 43-2622 (1977) .....	18, 38
Cal. Penal Code § 3700.5 (West 1986) .....	41
Fla. Stat. Ann. § 922.07 (West 1983) .....	8, 16, 18, 36

STATUTESPage

Fla. Stat. Ann. § 940.01 <u>et seq.</u> (West 1983) .....	16
Ga. Code Ann. § 27-2601 (1983) .....	28
Ga. Code Ann. § 27-2602 (1983) .....	18, 28
Idaho Code § 18-211(8) (1985 Supp.) .....	46
Idaho Code § 18-212(1) (1985 Supp.) .....	53
Ill. Ann. Stat. ch. 38 ¶ 104-13(e) (Smith-Hurd 1982) .....	45
Ill. Ann. Stat. ch. 38 ¶ 104-16(c) (Smith-Hurd 1982) .....	49
Ill. Ann. Stat. ch. 38 ¶ 104-16(e) (Smith-Hurd 1982) .....	57
Ind. Code Ann. § 11-10-4-4 (Burns 1981) .....	19
Kan. Stat. Ann. § 22-4006 (1981 Supp.) .....	43
Ky. Rev. Stat. Ann. § 431.240(2) (Baldwin 1978) .....	40
La. Code Crim. Proc. Ann. art. 643 (West 1981) .....	36
La. Code Crim. Proc. Ann. art. 646 (West 1981) .....	46

<u>STATUTES</u>	<u>Page</u>
La. Code Crim. Proc. Ann. art. 647 (West 1981) .....	52
Md. Ann. Code Art. 27 § 75(c) (1985) .....	18, 24
Mass. Ann. Laws ch. 127, § 152 (Michie/Law Coop. 1984 Supp.) .	18
Mass. Ann. Laws ch. 279, § 62 (Michie/Law Coop. 1984 Supp.) .	17, 55
Miss. Code Ann. § 99-19-57(2)(a)(1985 Supp.) ..	57
Mont. Code Ann. § 46-14-202(2)(1983) .....	24, 46
Mont. Code Ann. § 46-14-203 (1983) .....	25
Mont. Code Ann. § 46-14-221(1) (1983) .....	25, 53
Mont. Code Ann. § 46-14-221(2) (1983) .....	26
Mont. Code Ann. § 46-14-222 (1983) .....	26
Neb. Rev. Stat. § 29-2537 (1979) .....	43
Nev. Rev. Stat. § 176.435.1 (1983) .....	49
N.C. Gen. Stat. § 15A-1002(b)(1)(1983) .....	44, 53
N.Y. Correct. Law § 655 (McKinney 1984) .....	18, 44

<u>STATUTES</u>	<u>Page</u>
Okla. Stat. tit. 22	
§ 1004 <u>et seq.</u> (West 1985) ....	41
Ohio Rev. Code Ann.	
§ 2949.29 (Page 1983) .....	52
S.C. Code Ann. § 44-17-530	
(Law Co-op. 1985) .....	37, 45
S.C. Code Ann.	
§ 44-17-570 (Law Co-op. 1985) .	49
S.D. Codified Laws Ann.	
§ 23A-27A-24 (1979) .....	19
Utah Code Ann.	
§ 77-15-5(5) (1982) .....	46, 53
Va. Code § 19.2-182 (1983) ....	37
Wyo. Stat. § 7-13-901	
<u>et seq.</u> (1985 Supp.) .....	54
Wyo. Stat. § 7-13-902	
(1985 Supp.) .....	52
Wyo. Stat. § 7-13-903	
(1985 Supp.) .....	54

#### CONSTITUTIONAL PROVISIONS

U.S. Const. amend XIV .....	21, 31
Ga. Const. art. IV, § 2 .....	18
N.Y. Const. art. IV, § 4 .....	18

OTHER AUTHORITY

Blackstone,  
Commentaries on the Laws  
of England (1768) ..... 50

Tribe,  
American Constitutional Law  
(1978) ..... 49

THE INTERESTS OF THE OFFICE OF  
THE CAPITAL COLLATERAL REPRESENTATIVE  
FOR THE STATE OF FLORIDA ET AL.

The Office of the Capital Collateral Representative for the State of Florida (CCR) was created by the Florida Legislature, effective July 1, 1985, in response to the compelling need for representation in post-conviction proceeding for indigent prisoners sentenced to death.

This new State agency is charged with representing indigent prisoners sentenced to death who are unable to secure counsel in collateral challenges in State or Federal courts after direct appellate proceedings are concluded and the conviction and sentence have been affirmed.

As the State agency expressly responsible -- under a limited budget -- for representing all indigent Florida

prisoners under sentence of death, CCR has a critical interest in the establishment of appropriate guidelines for procedural due process protections for its clients who may have become insane while facing execution.

The Mental Health Association of Florida, a non-profit corporation, works for improved research, prevention, detection, and treatment of mental illness. Its members include clients of mental health services, their families, and other interested citizens.

MHAF has a clear interest in this case for two reasons. First, some of its members receive mental health treatment and are potentially vulnerable to conviction, sentence, and execution even while being treated. Second, MHAF adopted a policy statement in 1984 on the mental capacity to be executed,

opposing the execution of anyone lacking it, opposing the appointment of government psychiatrists to determine it, and endorsing judicial determination of it. MHAF, having lent its expertise to bring this issue to the public's attention, is eager that it be resolved favorably in this Court.

The National Mental Health Association (NMHA) is the nation's largest and oldest mental health organization, having been founded in 1909. Its membership and goals, and its interests and expertise for the purposes of this brief, are similar to those of the MHAF, which is a division of the NMHA.

The NMHA is particularly concerned that one of its goals, that of ensuring that everyone who needs psychiatric care receives it, is blocked by the inadequate procedures of various

states ostensibly adhering to the common-law right of the insane not to be executed.

SHARE of Daytona Beach, Florida, Inc., formed in 1980 and incorporated in 1985, is a public advocacy group for mental patients and former mental patients. SHARE (which stands for Self Help Association Regarding Emotions) also conducts peer counseling for indigent people with mental problems. It is concerned that Florida death-row inmates who become insane, particularly indigent ones such as Petitioner, do not receive adequate treatment. SHARE joins this brief to demonstrate how this problem arises under the vagaries of Florida law and practice.

The Montana Mental Health Consumers Advocacy Project, formed in 1983 and based in Billings, Montana, is a political action organization for and

of former mental patients. An unincorporated association, the Advocacy Project works to end discrimination against and stigmatizing of mental patients and former mental patients. It also lobbies legislatively for the rights of mental patients. Through its legislative work, the Advocacy Project is familiar with the Montana statutes meticulously ensuring that condemned prisoners who become insane are not executed and are treated. The Group brings these statutes to the Court's attention and requests that condemned prisoners in all states be accorded at least as much due process protection.

On Our Own, Inc. is a Baltimore, Maryland organization of people who have spent time in psychiatric facilities. Its members engage in peer support, and public advocacy for former and current

mental patients. Its goals include ensuring both proper treatment for psychiatric disturbances and proper diagnosis as well. On Our Own believes that the procedures of Maryland and other states to protect insane prisoners from being executed cannot be effective when they do not even require psychiatric examinations before sanity is determined. On Our Own suggests to the Court that Maryland's procedure is the least adequate among the states with applicable statutes and demonstrates the need to articulate minimum due process requirements in this area.

The Mental Patients' Association of New Jersey is an unincorporated statewide network of former and current mental patients and their self-help organizations. The Association is aware that statute and case law in New Jersey

is silent on the procedure to transfer insane inmates from death row to mental health facilities. In the face of such silence, the Association wishes to convey to this Court the federal due process minimums it perceives are necessary in New Jersey to protect the right not to be executed while insane.

The Mental Patients' Association of Philadelphia was formed to prevent erosion of the rights and freedoms of those who are, have been, and may need to be hospitalized for psychiatric illness. The Association is particularly concerned that the common-law prohibition on executing a person the State knows is insane is evaded when the State chooses to ignore insanity or refuses to institute proceedings to determine it. The Association lends to this brief pro-

cedural proposals to stem the erosion of the right not to be executed while insane.

### FACTS

Amici adopt the Statement of the Case submitted by Petitioner Alvin Ford in his Brief.

### SUMMARY OF ARGUMENT

The judgment of the Eleventh Circuit should be reversed and remanded for three reasons:

First, the Eleventh Circuit relied on Solesbee v. Balkcom, 339 U.S. 9 (1950), to uphold Section 922.07 of the Florida Statutes, but Solesbee is no longer good law, or is at best inapplicable

Solesbee is inapplicable because:

\*It assumed that governors would welcome information on the sanity vel non of condemned prisoners; Florida's governor, in accordance with his policy in such cases, apparently refused to review such information about Petitioner.

\*It analogized stay of execution for insanity with executive clemency, an inaccurate analogy in Florida, where the former is mandatory and the latter discretionary, and an accurate analogy in only two States, if any.

Solesbee is no longer good law because:

\*It was decided before the distinction between rights and privileges had been discarded.

\*It relied on the then recent case of Williams v. New York, 337 U.S. 241 (1949), the relevant portion of

which was overruled in Gardner v. Florida, 430 U.S. 349 (1977).

Second, were this Court to overrule Solesbee and hold allegedly insane inmates in all states are entitled to federal procedural due process in the determination of their sanity, without also articulating federal due process minimums for condemned prisoners, insane death-row inmates will continue to receive widely disparate procedural protections from the different states. For example, the same death-row inmate, sentenced for the same crime, could receive different protections if he were transferred between states, in light of this Court's recent decision of Heath v. Alabama, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985).

Third, while federal procedural due process is a flexible concept, it

requires certain minimums that were not met in this case, under Florida law and practice, and that are not met under the laws of most other states. The minimums for prisoners who may become insane while awaiting capital punishment are:

- \*Effective assistance of counsel at all stages of the process to determine sanity.

- \*The right to initiate the determination of sanity.

- \*The right to be examined by qualified and impartial mental examiners once insanity is alleged.

- \*The right to retain an examiner.

- \*Access to the written reports of any examiner submitted to the governor or the person determining sanity.

- \*An evidentiary hearing to determine sanity.

\*Adequate notice before the hearing.

\*The right to be present at the hearing.

\*The right to introduce evidence

\*The right to compel attendance of witnesses.

\*The right to cross-examine adverse witnesses.

\*The right to obtain a decision with findings of fact on which meaningful judicial review can be based.

\*Judicial determination of sanity.

\*The right to appeal a determination of sanity.

\*The same procedural protections to determine recovery of sanity as to determine insanity initially.

## ARGUMENT

- I. The decision in Solesbee must be overruled formally or at least be recognized as inapplicable.

The courts below held Petitioner was not denied procedural due process during the governor's determination of his sanity. Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984); Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985), reh'g en banc denied, 765 F.2d 154 (11th Cir. 1985), cert. granted, 106 S.Ct. 566, 88 L.Ed.2d 552 (1985). The courts so held despite their recognition that under Florida law "an insane person cannot be executed," Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984) (quoting Goode v. Wainwright, 448 So.2d 999, 1001 [Fla. 1984]); their acknowledgement that Petitioner was denied an adversarial hearing pursuant to "the governor's

publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane," Goode v. Wainwright, 448 So.2d 999, 1001 (Fla. 1984); and their knowledge that the governor, pursuant to that same policy, apparently did not consider the report of Dr. Harold Kaufman, who found Petitioner insane.

The sole authority for those decisions was this Court's decision in Solesbee v. Balkcom. Solesbee, however, is inapposite for four reasons.

First, the facts here were not present in Solesbee: a per se rule by Florida against advocacy on behalf of a condemned prisoner during the determination of his sanity in the face of direct evidence of his insanity. "Whether this

Governor declined to hear any statements on petitioner's behalf, this record does not show." Solesbee, 339 U.S. at 13.

This Court in Solesbee, with no record of any exclusion of evidence on behalf of Solesbee, assumed that the governor would accept and consider all direct evidence proffered on behalf of the condemned: "We would suppose that most if not all governors, like most if not all judges, would welcome any information which might be suggested in cases when human lives depend upon their decision." 339 U.S. at 13. Dr. Kaufman's report was not welcomed in this case; there is no evidence that it was even considered.

Second, this Court in Solesbee relied heavily on a mistaken belief in the similarity between executive clemency or pardon and stay of execution by reason of insanity. 339 U.S. at 11-12.

There is no such similarity under the law of Florida and most other states. Florida places pardons and similar acts of clemency in "the sole, unrestricted, unlimited discretion" of the governor, Sullivan v. Askew, 348 So.2d 312, 315 (Fla., 1977), cert. denied, 434 U.S. 878 (1977); see also, Chapter 940 of the Florida Statutes, but flatly prohibits the governor from executing an insane person.<sup>1/</sup> There is no discretion. Once insanity is determined, execution must be stayed.

The relevant statute, Section 922.07(3) of the Florida Statutes, uses mandatory language: a condemned prisoner lacking capacity "shall" be committed to

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<sup>1/</sup> Ironically, the governor as a matter of practice always holds hearings on requests for clemency, despite their discretionary nature, and never holds hearings to determine sanity.

a mental institution until his sanity is restored. Similarly, under the common law of Florida, "one [could not] be . . . executed while insane." Perkins v. Mayo, 92 So.2d 641, 644 (Fla. 1957). See also Ex parte Chesser, 93 Fla. 291, 111 So. 720, 721 (Fla. 1927); Hysler v. State, 136 Fla. 563, 187 So. 261, 262 (1939).

The analogy between executive clemency and a governor's suspension of execution by reason of insanity is accurate, if at all, in only two states. The governors of Massachusetts and New York, alone among state executives, have discretion both to grant executive clemency and to suspend execution for reason of insanity. (In Massachusetts, the two functions are subject to the advice and consent of the executive council.) Mass. Ann. Laws. ch. 279,

§ 62 (Michie/Law Coop. 1984 Supp.); id. at ch. 127, § 152; N.Y. Correct. Law 655 (McKinney 1984 Supp.); N.Y. Const. art. IV, § 4.

Not even in Georgia, where Solesbee arose, does the analogy still hold. The governor retains discretion to suspend the execution of insane prisoners, Ga. Code Ann. § 27-2602 (1983), but has lost the power of executive clemency to the State Board of Pardons and Paroles. Ga. Const. art. IV, § 2.

The four other states where governors play a role in suspending execution of insane prisoners require, rather than permit their governors to suspend such executions. See Ark. Stat. Ann. § 43-2622 (1977); Fla. Stat. Ann., supra; Md. Ann. Code Art. 27 § 75(c)

(1985 Supp.); S.D. Codified Laws Ann.  
§ 23A-27A-24 (1979).

Courts, not governors, suspend execution for reason of insanity in 29<sup>2/</sup> of the 37 states with applicable statutes or case law. The Solesbee Court's analogy is therefore invalid and its contention that "[s]eldom, if ever, has this power of executive clemency been subjected to review by the courts," 339 U.S. at 12, is irrelevant.

The third reason why Solesbee does not apply is that the radical changes in the law of procedural due process since this Court decided Solesbee

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<sup>2/</sup> Courts are responsible for suspending execution in the 24 states where courts or juries determine sanity. See Appendix I, category 8. Suspension is a judicial function in five of the states that defer to mental examiners to determine sanity: Connecticut, Delaware, Kansas, Nebraska, and Virginia. In Indiana, corrections officials in effect suspend execution. Ind. Code Ann. § 11-10-4-4 (Burns 1981).

have completely eroded the principal legal foundation on which it rested. Solesbee was decided when the procedural protections of the Due Process Clause were applicable to "rights," but not "privileges," including the "privilege" not to be executed while insane. See, e.g., Ughbanks v. Armstrong, 208 U.S. 481 (1908); Escoe v. Zerbst, 295 U.S. 490 (1935).

This Court has since rejected conditioning the availability of federal procedural due process on the distinction whether a "right" or "privilege" exists under state law. See Shapiro v. Thompson, 394 U.S. 618 (1969). Due process considerations no longer depend upon whether a State grants a "right" or a "privilege," Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970); Shapiro v. Thompson, 394 U.S. at 627 n.6 (1969);

see Wolff v. McDonnell, 418 U.S. 539, 557 (1974), Goss v. Lopez, 419 U.S. 565, 573 (1975); Bell v. Burson, 402 U.S. 535, 539 (1971), but rather "the extent to which an individual will be "'condemned to suffer grievous loss.'" Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 [1951] [Frankfurter, J., concurring]). Persons with "legitimate claims of entitlement" to benefits conferred under state law have been accorded procedural due process protections since Board of Regents v. Roth, 408 U.S. 564 (1972).

By virtue of the state-created right not to be executed while insane, see Perkins v. Mayo, and Hysler v. State, Florida has thus created an interest that warrants protection under the due process clause of the Fourteenth

Amendment. See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979); Board of Regents v. Roth.

Fourth and finally, subsequent decisions of this Court have undercut another major legal premise of Solesbee. Solesbee's refusal to extend due process protection to a post-conviction sanity determination was in part based on the then recent decision in Williams v. New York, 337 U.S. 241 (1949), which held that a sentencing judge could rely upon confidential information without violating procedural due process. The Court in Gardner v. Florida, 430 U.S. 349 (1977), overruled that portion of Williams and held Gardner was denied due process when his death sentence was based on

information he had no opportunity to refute or explain. 430 U.S. at 363.<sup>3/</sup>

In one of the two remaining cases that this Court relied on in Solesbee, Phyle v. Duffy, 334 U.S. 431 (1948), the due process issues were not decided, and on remand, Phyle received a hearing. In the other, Nobles v. Georgia, 168 U.S. 398 (1897), the "only question" was whether due process required a jury trial in a judicial proceeding. 168 U.S. at 405.

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3/ The Court in Gardner observed that the Williams opinion itself had "recognized that the passage of time justifies a re-examination of capital sentencing procedures." 430 U.S. at 356. "In 1949, when the Williams case was decided, no significant constitutional differences between the death penalty and lesser punishments for crime had been expressly recognized by this Court." Id. at 357. But after Williams, the Court "expressly recognized that death is a different kind of punishment from any other which maybe imposed in this country." Id. Gardner thus substantially undercut the reasoning of both Williams and Solesbee by noting that constitutional developments in the law of capital punishment and due process require greater procedural protections for those convicted of capital crimes.

- II. Condemned prisoners who may be insane face increasingly disparate legal treatment from the States if Solesbee is overruled but federal due process minimums are not articulated.

The various states accord a wide spectrum of procedural protections to condemned prisoners who may be insane. Protections range from almost nonexistent to comprehensive.

Maryland, for example, requires suspension of execution if after a medical, but not a psychiatric examination, "it shall appear to the satisfaction of the Governor" that the prisoner is insane. Md. Ann. Code. Art. 27 § 75(c) (1985).

By contrast, a condemned prisoner in Montana may initiate the process by alleging insanity. Mont. Code Ann. § 46-14-202 (1983). The trial

court shall appoint at least one psychiatrist to examine the prisoner, may commit the prisoner to a suitable facility for examination, and may direct a psychiatrist retained by the prisoner to participate in the report. Id.

The examination report shall be filed with the court, county attorney, and defense counsel. It shall include a description of the examination, a diagnosis of the prisoner's mental condition, and an opinion as to his capacity to understand the proceedings and assist in his defense. § 46-14-203.

If the report is contested by either the county attorney or defense counsel, the court shall hold a hearing. The parties may summon and cross-examine the psychiatrists, and offer evidence. § 46-14-221(1).

If the court determines the prisoner is unfit for execution, it shall commit him to an appropriate institution. § 46-14-221(2). A hearing is also used to determine if and when the prisoner regains fitness. § 46-14-222.

The wide disparity of procedural protections for condemned prisoners who may be insane has greater potential for anomalous results after this Court's recent decision of Heath v. Alabama, 106 S.Ct. 433, 88 L.Ed.2d 387.(1985).

In Heath, this Court held that two states may prosecute a defendant for the same crime under the dual sovereignty doctrine, without violating the double jeopardy clause of the Fifth Amendment. The case arose when Larry Gene Heath hired two men to kill his wife. She was kidnapped in Alabama and murdered in

Georgia. Georgia indicted Heath for murder; Alabama indicted him for murder during a kidnapping.<sup>4/</sup>

Heath "pleaded guilty to the Georgia murder charge in exchange for a sentence of life imprisonment, which he understood could involve his serving as few as seven years in prison." 106

S.Ct. at 435. (citation omitted).

Three months later, Alabama, dissatisfied with the punishment Heath faced in Georgia, indicted Heath for murder. See 106 S.Ct. at 442 (Marshall, J., dis-

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<sup>4/</sup> Dual prosecutions may result, not only when elements of an offense occur in different states, but also when two adjoining states share jurisdiction over a river between them that becomes the locus criminis. See State v. Cunningham, 102 Miss. 237, 59 So. 76, 80 (Miss. 1912). Under Heath, both states may prosecute offenses committed in the river's water or on a boat on the river, Welsh v. State, 126 Ind. 71, 25 N.E. 883 (Ind. 1890), a bridge over it, State v. Holden, 46 N.J. 361, 217 A.2d 132 (N.J. 1966), or a pier extending into it, State v. Federanko, 26 N.J. 119, 139 A.2d 30 (N.J. 1958).

sentencing). Alabama convicted Heath and sentenced him to death.

If Heath becomes arguably insane while awaiting judgment in Alabama he could receive a jury trial to determine his sanity. Ala. Code § 15-16-23 (1982). Had he been sentenced to death in Georgia, however, he would be denied such a trial. Ga. Code Ann. § 27-2601 (1982). He would be at the mercy of the governor, who has discretion whether to appoint a mental examiner, to determine sanity, and to order commitment to the Department of Human Resources. Id. at § 27-2602. It was this procedure, leaving so much to the discretion of the governor, that was upheld in Solesbee.

Heath did not address an important and relevant issue here: Which state executes judgment when sentences are mutually exclusive, as in the case of two death sentences?

Heath's sentence of life imprisonment from Georgia and death sentence from Alabama will be mutually exclusive if he serves his Georgia sentence first and is never paroled or otherwise released; i.e., if Heath is imprisoned in Georgia until he dies, Alabama will never have the opportunity to execute him. Heath's sentences will also be mutually exclusive if Alabama executes judgment first; i.e., once Alabama imposes the death sentence, Heath cannot serve his life term in Georgia.<sup>5/</sup>

If Alabama may base its decision to prosecute Heath on its dissatisfaction with Georgia's sentence, see Heath, 106

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<sup>5/</sup> In fact, Heath is imprisoned in Alabama, which will probably try to impose capital punishment. Telephone interview with Ronald J. Allen, Heath's counsel before this Court (Jan. 16, 1986).

S.Ct. at 442 (Marshall, J., dissenting), Georgia could attempt to execute a prisoner, whom both states have convicted of capital crimes, based on its disapproval of Alabama's suspending execution due to insanity.

Georgia's weaker procedural guarantees would make a prisoner's execution easier. Executive officials in Alabama, to evade the trial judge's suspension of execution in that state, could cooperate in an inmate's transfer to Georgia. Cf. Heath, 106 S.Ct. at 444-45 (Marshall, J., dissenting) (Georgia and Alabama combined forces to secure Heath's death).

Were this Court to overrule Solesbee without articulating federal due process minimums for condemned prisoners, not only would different insane death-row inmates continue to

receive different procedural protections in different states, the same death-row inmate, in light of Heath, could receive vastly different protections as he was transferred between states.

The Fourteenth Amendment prohibits the States from depriving any person of life without due process of law. It is a federal constitutional right that does not vary with the state in which it is enforced. Although the States must respect and protect this right, it is not a state right whose minimums their legislatures may define.

The federal constitutional right of the insane not to be executed is an inappropriate subject of federalism and laboratory experimentation among the States. Cf. Chandler v. Florida, 449 U.S. 560 (1981) (absent a showing of prejudice of constitutional dimensions to defendants, states may experiment with radio,

television, and still photographic coverage of criminal trials). See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (states may serve as laboratories for "novel social and economic experiments"). Cf. Garcia v. San Antonio Metro Transit Authority, 470 U.S. \_\_\_\_\_, 105 S. Ct. 1005, 1017, 83 L.Ed.2d 1016 (1985) (commerce clause case) (federal supervision of state judicial action is permissible only in constitutional matters) (citing Erie R. Co. v. Tompkins, 304 U.S. 64, 78-79 [1938])).

Amici are not requesting this Court to impose a "code of procedure; that is the responsibility of each State." Morrissey, 408 U.S. at 488. Amici do request, however, that this Court articulate "the minimum requirements of due process," id. at 489, for prisoners who become insane while awaiting capital punishment.

- III. Procedural due process requires certain minimal protections that were not provided here by the State of Florida and are not provided by most of the remaining states with capital punishment.

The divergent state practices supply a pool of workable procedural protections from which due process minimums can be drawn.

Recognizing that "due process is flexible and calls for such procedural protections as the particular situation demands," Morrissey v. Brewer, 408 U.S. at 481; see Bell v. Burson, 402 U.S. at 540, amici submit that the method in Florida and other states to determine the fitness for execution of a condemned prisoner who may be insane must comprise certain due process minimums:

1. Effective assistance of counsel at all stages of the process to determine sanity;

2. Rights to initiate the determination of sanity; to be examined by qualified and impartial mental examiners once insanity is alleged; to retain an examiner; and to have access to the written reports of any examiner submitted to the governor or the person determining sanity.

3. An evidentiary hearing to determine sanity, after adequate notice to the condemned prisoner, at which the prisoner may be present, introduce evidence, cross-examine adverse witnesses, and obtain a decision with findings of fact on which meaningful judicial review can be based.

4. Judicial determination of sanity and review.

1. Condemned prisoners must be provided effective assistance of counsel at all stages of the determination process.

"'The fundamental requisite of due process of law is the opportunity to be heard.'" Goldberg, 397 U.S. at 267 (quoting Grannis v. Ordean, 234 U.S. 385, 394 [1914]). But the right "'would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'" Goldberg, 397 U.S. at 270 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 [1932]).

That is especially true for insane prisoners, who being too unfit to

assist their attorneys<sup>6/</sup>, cannot be expected to proceed without them. "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Goldberg, 397 U.S. at 268-69 (footnote omitted).

Nineteen states recognize the right of condemned prisoners to be represented by counsel during determinations of sanity. See Appendix I, category 7. Of these 19 states, Florida, Louisiana, South Carolina, and Virginia, appoint counsel for indigent prisoners. Fla. Stat. Ann. § 922.07(1) (West 1983); La. Code Crim. Proc. Ann. art. 643 (West

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6/ Seven states (Idaho, Louisiana, Mississippi, Missouri, Montana, North Carolina, and Utah) include in their statutory definition of unfitness for execution the prisoner's inability to assist counsel in his own defense. Oklahoma has done so by case law. Bingham v. State, 82 Okla. Crim. 305, 169 P.2d 311 (Okla. Crim. App. 1946). Illinois statute requires mental examiners to report on the prisoner's ability to assist counsel.

1981); S.C. Code Ann. § 44-17-530 (Law Co-op. 1985); Va. Code § 19.2-182 (1983). Although defense counsel was appointed for at least one condemned prisoner in California, the state supreme court ruled that due process did not require it. People v. Riley, 37 Cal.2d 510, 235 P.2d 381 (Cal. 1951).

2. Condemned prisoners must have rights to initiate sanity proceedings; to be examined by qualified and impartial mental examiners once insanity is alleged; to retain their own examiners; and to have access to the written reports of any examiner submitted to the governor or the person determining sanity.

The right not to be executed while insane, which no state has repudiated, has no remedy if condemned prisoners are powerless to initiate proceed-

ings to determine their sanity. Twenty-two states grant state officials, such as judges, governors, wardens, and sheriffs, discretion to initiate suspensions of execution for reasons of insanity.<sup>7/</sup> Arkansas, for example, provides that when the state penitentiary superintendent "is satisfied that there are reasonable grounds for believing that a condemned prisoner is insane," the superintendent may transfer him to a state hospital. Ark. Stat. Ann. § 43-2622 (1977) (emphasis added).

"There can hardly be a comparable situation under our constitutional scheme of things in which an interest so great, that an insane man not be executed,

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<sup>7/</sup> Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Kansas, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, New York, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, and Wyoming.

is given such flimsy procedural protection, and where one asserting a claim is denied the rudimentary right of having his side submitted to the one who sits in judgment." Caritativo v. California, 357 U.S. 549, 552-53 (1958) (Frankfurter, J., dissenting).

The Court of Appeals of Kentucky, now known as the Supreme Court of Kentucky, noted, "[T]he commonwealth or county attorney is expected to, and usually does, act upon an affidavit or information as to the necessity of the inquest, furnished by some relative, friend, or acquaintance of the lunatic, having knowledge of his condition. . . ."

Davidson v. Commonwealth, 174 Ky. 789, 192 S.W. 846, 847 (Ky. 1917) (emphasis added). The court, interpreting statutes including one similar to the current

Kentucky Revised Statute § 431.240(2), found no "provision that authorizes or allows the inquest upon the initiative of the supposed lunatic or any one for him. . . ." 192 S.W. at 847.

Perhaps it was the court's recognition of the danger that the commonwealth and county attorneys might not act as expected that led it to suggest that a condemned prisoner may invoke habeas corpus to initiate a determination of his sanity. 192 S.W. at 849 (dictum).

Similarly, the Tenth Circuit ordered a district court in Oklahoma to begin mental examinations and hold sanity hearings in response to a writ of habeas corpus by a petitioner acting as the condemned prisoner's mother and next friend. Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981). Oklahoma statute does

not allow condemned prisoners to initiate investigations into their own sanity.

Okla. Stat. tit. 22 § 1004 et seq. (West 1985).

Seven states statutorily grant the prisoner, his counsel, or next friend the right to initiate proceedings to determine sanity. See Appendix I, category 1. A eighth state, California, denies the right, Caritativo, but begins a sanity investigation automatically upon the scheduling of an execution. Cal. Penal Code § 3700.5 (West 1986) (added by 1961 Cal. Stat., c. 1739, after Caritativo).

The rest of the states are unclear about who may initiate proceedings.

Once the question of insanity has been raised by the prisoner or another person empowered to do so, qualified mental examiners should diagnose

the prisoner's condition. "Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the 'elusive and often deceptive symptoms of insanity'. . . . Ake v. Oklahoma, 470 U.S. \_\_\_\_\_, 105 S. Ct. 1087, 1095 (1985) (quoting Solesbee, 339 U.S. at 12).

Fourteen states, see Appendix I, category 2, including Florida, require the appointment of mental examiners or the prisoner's commitment to a mental health facility when a condemned prisoner's sanity is suspect; 11 states permit it.<sup>8/</sup>

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<sup>8/</sup> Arkansas, Colorado, Connecticut, Delaware, Georgia, Louisiana, Missouri, New York, North Carolina, Rhode Island, and Utah.

Some states, however, use "lay witnesses," Ake, 105 S.Ct. at 1095, as mental examiners: Kansas and Nebraska, for example, appoint state hospital officials. Kan. Stat. Ann. § 22-4006 (1981 Supp.); Neb. Rev. Stat. § 29-2537 (1979).

In Kansas, the superintendents of four state hospitals or their assistants determine a prisoner's sanity without benefit of an adversarial hearing or input from an examiner appointed by the prisoner. Kan. Stat. Ann. § 22-4006 (1981 Supp.).

However, since "an impartial decision maker is essential," Goldberg, 397 U.S. at 271, state employees of the executive branch, which is ultimately responsible for carrying out death sentences, generally should not serve as mental examiners.

In New York, mental examiners appointed by the governor must be "disinterested," N.Y. Correct. Law § 655 (McKinney 1984); in North Carolina, judicially-appointed examiners must be "impartial." N.C. Gen. Stat. § 15A-1002(b)(1) (1983).

Impartial mental examiners are especially important when they do more than report their opinion of the prisoner's insanity to the governor or court, but make the final determination of sanity itself, as they do in nine states. See Appendix I, Category 8.

Six states recognize the importance of mental examiners appointed for or retained by condemned prisoners. Cf. Ake (when sanity at the time of the offense will be a significant trial issue, the Constitution requires states to assure defendants access to psychia-

trists). "[W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, . . . to help present testimony, and to assist in preparing the cross-examination of a state's psychiatric witnesses, the inaccurate resolution of sanity issues is extremely high." Ake, 105 S. Ct. at 1096.

South Carolina requires court appointment of an independent examiner for indigent prisoners, with the examination at public expense. S.C. Code Ann. § 44-17-530 (Law Co-op. 1985). Illinois permits but does not require the sentencing court to appoint a qualified expert chosen by an indigent prisoner, to be reimbursed by the county. Ill. Ann. Stat. ch. 38 ¶ 104-13(e) (Smith-Hurd 1982).

In Montana, the court may direct that a psychiatrist retained by

the prisoner participate in the mental examination. Mont. Code Ann. § 46-14-202(2) (1983). Idaho guarantees that the prisoner's own expert have reasonable access to the prisoner for examination purposes. Idaho Code § 18-211(8) (1985 Supp.)

In Utah, an alienist who has knowledge of the prisoner's mental condition may be subpoenaed to testify at the competency hearing. Utah Code Ann. § 77-15-5(5). And in Louisiana, "[T]he court order for a mental examination shall not deprive the defendant . . . of the right to an independent mental examination by a physician of his choice. . . ." La. Code Crim. Proc. Ann. art. 646 (West 1981).

The mental examiners should report in writing. Knowing that their findings can be scrutinized by all parties, the public, and when applicable,

the decision-maker and reviewer of the decision, encourages the examiners to report fairly and accurately. Wolff v. McDonnell, 418 U.S. at 565 (1974). Forcing the examiners to articulate their findings further encourages accuracy. Cf. Goldberg, 397 U.S. at 271 ("the decision maker should state the reasons for his determination and indicate the evidence he relied on, [citations omitted] though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.").

Of the 25 states that examine or observe condemned prisoners mentally, 14, not including Florida, require the examiners to report in writing. See Appendix 1, category 4.

Prisoners should also have timely access to examiners' written reports, something that is not always

accorded in Florida. Goode v. Wainwright, 448 So.2d 999 (Fla. 1984) (psychiatric commission's letter to governor opined that condemned prisoner understood nature and purpose of his death sentence; letter was withheld from counsel until after governor signed death warrant; no due process violation found). In a similar situation, this Court invoked due process to protect defendants from being sentenced in capital cases based, at least partly, on information withheld from them and their counsel. Gardner v. Florida, 430 U.S. at 359-62 (1977).

3. An evidentiary hearing must be held to determine sanity, after adequate notice to the condemned prisoner, at which the prisoner may be present, introduce evidence, compel attendance of witnesses, cross-examine adverse witnesses, and obtain a decision with findings of fact on which meaningful judicial review can be based.

Three states, Illinois, Nevada, and South Carolina guarantee prisoners the right to be present at their sanity hearings. Ill. Ann. Stat. ch. 38 ¶ 104-16(c) (Smith-Hurd 1982); Nev. Rev. Stat. § 176.435.1 (1983); S.C. Code Ann. § 44-17-570 (Law Co-op. 1985). See Appendix I, category 6. If one purpose of due process is protecting human dignity, see generally L. Tribe, American Constitutional Law § 10-7 (1978), condemned prisoners must have the option to

be present when their fate is being decided.

Another reason to guarantee the prisoner's presence is related to a major purpose of the historic prohibition on executing the insane: "had the prisoner been of sound memory, he might have alleged something in stay of execution or judgment." 4 W. Blackstone, Commentaries on the Laws of England 24-25 (1768). See Nobles v. Georgia, 168 U.S. at 406 (citing Blackstone and other sources).

Nine states<sup>9/</sup> recognize a connection between a prisoner's unfitness for execution and his inability to assist counsel. By the same reasoning that the prisoner's sanity is a prerequisite to assisting his own defense

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<sup>9/</sup> Supra note 6, at 36.

effectively, the prisoner's presence at the hearing is a prerequisite to assisting his counsel in effectively establishing insanity.

An adversarial evidentiary hearing, held after adequate notice, Wolff v. McDonald, 418 U.S. at 563-64, with participation by both the state and the prisoner through his counsel, must be held to determine the prisoner's sanity. Of the 37 states with statutes or case law applicable to execution of the insane, 12, not including Florida, require some form of adversarial hearings. See Appendix I, category 5.

The prisoner must be guaranteed the right to present evidence. Morrissey v. Brewer, 408 U.S. at 489 (1972). See also Goldberg, 397 U.S. at 267 ("The fundamental requisite of due process is the opportunity to be heard") (quoting

Grannis v. Ordean, 234 U.S. 385, 394 [1914]). The prisoner must also be allowed to cross-examine adverse witnesses. Morrissey, 408 U.S. at 489. See also Goldberg, 397 U.S. at 269 ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses").

Twelve states allow condemned prisoners to present witnesses or evidence during sanity hearings or examinations. See Appendix I, category 5B. Louisiana, and apparently Ohio and Wyoming permit prisoners to compel attendance of witnesses. La. Code Crim Proc. Ann. art. 647 (1981); Ohio Rev. Code Ann. § 2949.29 (Page 1982) ("Witnesses may be produced and examined. . . .") Wyo. Stat. § 7-13-902 (1985 Supp.) (same wording as Ohio's statute).

In Idaho, Montana, and North Carolina, the prisoner may summon the mental examiners. Idaho Code § 18-212(1) (1985 Supp.); Mont. Code Ann. 46-14-221(1) (1983); N.C. Gen. Stat. § 15-A-1002 (b) (1) (1983). In Utah, the prisoner may subpoena any alienist who has knowledge of his mental condition. Utah Code Ann. § 77-15-5(5) (1982).

Eight states, not including Florida, provide for some form of cross-examination by the prisoner or his counsel. See Appendix I, category 5C. Five of those states limit cross-examination to mental examiners. Id.

Final determinations of sanity vel non (in addition to the written reports of mental examiners, supra at 46-7) must be in writing, indicating the evidence relied on and the reasons for the decision, to provide a basis for

meaningful review. Wolff v. McDonald, 418 U.S. at 564-65.

The procedure to determine if the prisoner has recovered sanity must have as many safeguards as the initial determination of insanity. Procedural protections during the initial determination are of little value if the governor may decide ex parte that the prisoner has regained fitness for execution.

In Wyoming, for example, a jury determines a condemned prisoner's sanity after an inquiry at which witnesses may be examined. Wyo. Stat. § 7-13-901 et seq. (1985 Supp.). But the governor, "as soon as he shall be convinced that the convict has become of sane mind," may schedule the execution. Id. at § 7-13-903.

Fourteen states, including Florida, guarantee as many procedural

protections during subsequent determinations of sanity as during the initial one, nine do not, and 14 are unclear. See Appendix I, category 10.

4. Sanity must be determined and reviewable judicially.

The prisoner's sanity must ultimately be determined by a court or jury.

Some states allow mental examiners or the governor to make final determinations. Mental examiners determine sanity in nine states; the governor does in three states, including Florida. See Appendix I, category 8. In Massachusetts, it is unclear whether the governor and the executive council, two examining psychiatrists, or all of them determine sanity. Mass. Ann. Laws ch. 279, § 62 (Michie/Law Coop. 1984 Supp.).

In the remaining 24 states, courts or juries determine sanity.

Because "the right to an impartial decision-maker is required by due process," Arnett v. Kennedy, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part), governors should not make final determinations of sanity.

Although their input is vital, mental examiners should also not make final determinations. "Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, [and] on the appropriate diagnosis to be attached to given behavior and symptoms. . . . Perhaps because there is often no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary fact-

finders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party." Ake, 105 S. Ct. at 1096.

The determination of insanity must not only be judicially determined but appealable as well. Illinois allows determinations of sanity to be appealed. Ill. Ann. Stat. ch. 38 ¶104-16(e) (Smith-Hurd 1982). Mississippi permits the determination of recovery of sanity to be appealed. Miss. Code Ann. § 99-19-57 (2)(a) (1985 Supp.). Twelve states, including Florida, specifically preclude appealing determinations of insanity, and the rest are unclear. See Appendix I, category 9.

Precluding such appeals, however, strips a right of a remedy. Bulger v. People, 61 Colo. 187, 156 P.

800, 806 (Colo. 1916) (Hill and Scott, JJ., dissenting).-

CONCLUSION

For this and the foregoing reasons, amici respectfully request that the judgment of the Eleventh Circuit be reversed and remanded.

Sanford L. Bohrer  
Sanford L. Bohrer  
(Counsel of Record)  
THOMSON ZEDER BOHRER WERTH  
ADORNO & RAZOOK  
4900 Southeast Financial Center  
200 South Biscayne Boulevard  
Miami, Florida 33131  
(305) 350-7200

## APPENDIX I

1. Is the prisoner, counsel, or next friend guaranteed the right to initiate the process to determine sanity?
2. Must the prisoner be examined mentally or committed before a final determination of sanity is made?
3. May the prisoner appoint or retain his own mental examiner?
4. Must mental examiners report in writing?
5. Must an adversarial hearing held?
- 5A. Is the prisoner guaranteed the right to compel attendance of witnesses?
- 5B. Is the prisoner guaranteed the right to present witnesses or evidence?
- 5C. Is the prisoner guaranteed the right to cross-examine witnesses?
6. Is the prisoner guaranteed the right to be present?
7. Is the prisoner guaranteed the right to counsel during the determination of sanity?

8. Is sanity determined by court (C), jury (J), mental examiner(s) (E), or governor (G)?
9. Is the determination of sanity appealable?
10. Does the procedure to determine recovery of sanity have as many safeguards as the initial determination of insanity?

Y	=	Yes
N	=	No
NA	=	Not Applicable
U	=	Unclear
*	=	State does not have death penalty.
-	=	State does not have applicable statute or case law.

	1	2	3	4	5	SA	SB	SC	6	7	8	9	10
Alabama	N	N	U	NA	N	N	N	N	N	N	C	N	N
Alaska	*	*	*	*	*	*	*	*	*	*	*	*	*
Arizona	N	N	U	NA	N	N	N	N	N	N	J	U	U
Arkansas	N	N	U	N	N	NA	NA	NA	NA	N	E	U	U
California	1	Y	U	NA	N	N	N	N	N	N	J	N	N
Colorado	Y	N	U	N	Y	U	Y	U	U	Y	C	N	Y
Connecticut	N	N	N	Y	N	NA	NA	NA	NA	N	E	U	N
Delaware	N	N	N	Y	N	NA	NA	NA	NA	N	E	U	U
Florida	N	Y	N	N	N	N	N	NA	2	Y	G	N	Y
Georgia	N	N	N	Y	N	NA	NA	NA	NA	N	G	N	N
Hawaii	*	*	*	*	*	*	*	*	*	*	*	*	*
Idaho	N	Y	Y	Y	Y	3	Y	3	2	Y	C	U	Y
Illinois	Y	Y	Y	Y	Y	U	Y	Y	Y	Y	C	Y	Y
Indiana	Y	Y	N	Y	N	NA	NA	NA	NA	Y	E	U	Y
Iowa	*	*	*	*	*	*	*	*	*	*	*	*	*
Kansas	N	Y	N	Y	N	NA	NA	NA	NA	N	E	U	Y
Kentucky	4	N	U	NA	N	NA	NA	NA	NA	N	C	N	U
Louisiana	Y	N	Y	Y	Y	Y	Y	3	2	Y	C	U	Y
Maine	*	*	*	*	*	*	*	*	*	*	*	*	*
Maryland	N	N	N	N	N	NA	NA	NA	NA	N	G	U	Y

	1	2	3	4	5	5A	5B	5C	6	7	8	9	10
Massachusetts	N	Y	N	N	N	N	N	N	N	N	5	U	Y
Michigan	*	*	*	*	*	*	*	*	*	*	*	*	*
Minnesota	*	*	*	*	*	*	*	*	*	*	*	*	*
Mississippi	Y	N	U	NA	N	N	N	N	N	Y	C	U	Y
Missouri	N	Y	N	N	N	N	N	N	N	Y	C	U	N
Montana	Y	Y	Y	Y	Y	3	Y	3	2	Y	C	U	Y
Nebraska	N	Y	N	Y	N	NA	NA	NA	NA	N	E	U	Y
Nevada	N	Y	U	Y	Y	U	Y	Y	Y	Y	C	U	N
New Hampshire	-	-	-	-	-	-	-	-	-	-	-	-	-
New Jersey	-	-	-	-	-	-	-	-	-	-	-	-	-
New Mexico	N	N	U	NA	N	N	N	N	N	N	C	N	N
New York	N	N	N	N	Y	N	Y	U	2	Y	E	N	U
North Carolina	Y	N	U	Y	Y	3	Y	3	U	Y	C	U	U
North Dakota	*	*	*	*	*	*	*	*	*	*	*	*	*
Ohio	N	N	N	NA	Y	Y	Y	Y	N	Y	C <sub>or</sub> J	U	U
Oklahoma	4	N	U	NA	N	N	N	N	N	Y	J	N	N
Oregon	-	-	-	-	-	-	-	-	-	-	-	-	-
Pennsylvania	N	U	U	U	U	U	U	U	U	U	C	U	U
Rhode Island	N	N	U	N	N	NA	NA	NA	NA	N	C	U	Y
South Carolina	N	Y	Y	Y	Y	N	N	N	Y	Y	C	N	U
South Dakota	N	Y	N	N	Y	N	Y	U	2	Y	E	N	Y

	1	2	3	4	5	SA	SC	SD	6	7	8	9	10
Dessee	N	N	U	U	U	U	U	U	U	U	C	U	U
as	N	U	U	U	U	U	U	U	U	U	C	N	U
h	U	N	Y	Y	Y	6	6	6	2	Y	C	U	U
mont	-	-	-	-	-	-	-	-	-	-	-	-	-
inia	N	Y	U	U	N	NA	NA	NA	U	Y	E	U	U
ington	N	N	U	U	U	N	N	N	N	Y	C	U	U
Virginia	*	*	*	*	*	*	*	*	*	*	*	*	*
onsin	*	*	*	*	*	*	*	*	*	*	*	*	*
ing	N	N	U	NA	U	Y	Y	U	N	N	J	U	N

1. Although a condemned prisoner is not guaranteed the right to initiate the process, it begins automatically 20 days before a scheduled execution.

2. Prisoner's counsel may be present at the hearing. It is unclear whether the prisoner may too.

3. Prisoner may compel attendance of examining psychiatrists, and cross-examine them.

4. Although condemned prisoner is not guaranteed the statutory right to initiate the process, he may do so through habeas corpus proceedings, according to courts.

5. It is unclear who determines sanity: the governor and the executive council, two examining psychiatrists, or, all of them.

6. Alienists who examined prisoner or who otherwise have knowledge of his mental condition may be subpoenaed to testify.

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This Appendix differs slightly from the one submitted by amici on petition for writ of certiorari.

## APPENDIX II

Of the 41 states that impose capital punishment, 29 give some recognition to the right not to be executed while insane: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Washington, and Wyoming. Three states have done so through case law, Pennsylvania, Texas, and Washington; Louisiana has done so through a combination of case law and statute; the rest have done so through statute.

Four states bar, more generally, punishing or proceeding against insane prisoners: Idaho, North Carolina, and South Carolina by statute, and Tennessee by case law.

Four states provide for the transfer of insane prisoners, whether or not on death row, to mental health facilities: Delaware, Indiana, Rhode Island, and Virginia, all by statute.

Four states have no applicable statute or case law, leaving the common-law prohibition in effect: New Hampshire, New Jersey, Oregon, and Vermont.

A list of the 37 states with statutes or cases applicable to execution of the insane, and their citations, follows:

- Alabama Ala. Code § 15-16-23  
(1982). See Magwood v. State, 449 So.2d 1267  
(Ala. Crim. App. 1984).
- Arizona Ariz. Rev. Stat. Ann.  
13.4021 et seq. (1978).
- Arkansas Ark. Stat. Ann. § 43-2622  
(1977). See Leggett v. Henslee, 321 S.W. 2d 764  
(Ark. 1959), cert.  
denied, 361 U.S. 865  
(1959).
- California Cal. Penal Code § 3700  
et seq. (West 1986).  
See Caritativo v. California, 357 U.S. 549  
(1958); McCracken v. Teets, 41 Cal.2d 648,  
262 P.2d 561 (Cal.  
1953); Caritativo v. Teets, 47 Cal.2d 304,  
303 P.2d 339 (Cal.  
1956), aff'd sub. nom. Caritativo v. California; People v. Riley, 37  
Cal.2d 510, 235 P.2d 381  
(Cal. 1951); Phyle v. Duffy, 34 Cal.2d 144,  
208 P.2d 668 (Cal.  
1949), cert. denied, 338  
U.S. 895 (1949); Williams v. Duffy, 32 Cal.2d 578,  
197 P.2d 341 (Cal.  
1948), cert. denied, 335  
U.S. 840 (1948).
- Colorado Colo. Rev. Stat. § 16-8-110  
et seq. (1978).

Connecticut	Conn. Gen. Stat. Ann. § 54-101. (West 1985 Supp.).
Delaware	Del. Code Ann. title 11, § 406 (1979).
Florida	Fla. Stat. Ann. § 922.07 (West 1983). See <u>Ford</u> <u>v. Wainwright</u> , 752 F.2d 526 (11th Cir. 1985), cert. granted, 106 S.Ct. 566, 88 L.Ed.2d 552 (1985); <u>Goode v. Wainwright</u> , 731 F.2d 1482 (11th Cir. 1984); <u>Ford v. Wainwright</u> , 451 So.2d 471 (Fla. 1984).
Georgia	Ga. Code Ann. 27-2601 <u>et</u> <u>seq.</u> (1983). See <u>Solesbee</u> <u>v. Balkcom</u> , 339 U.S. 9 (1950).
Idaho	Idaho Code § 18-210 <u>et</u> <u>seq.</u> (1985 Supp.).
Illinois	Ill. Ann. Stat. ch. 38 ¶ 1005-2-3 (Smith-Hurd 1982).
Indiana	Ind. Code Ann. § 11-10-4-2 <u>et seq.</u> (Burns 1981).
Kansas	Kan. Stat. Ann. § 22-4006 (1981).
Kentucky	Ky. Rev. Stat. Ann. § 431.240(2) (Baldwin 1978). <u>Davidson v.</u> <u>Commonwealth</u> , 174 Ky. 789, 192 S.W. 846 (Ky. 1917).

Louisiana	La. Code Crim. Proc. Ann. art. 641 <u>et seq.</u> (West 1981). <u>See State</u> <u>v. Miguez</u> , 194 La. 1081, 195 So. 545 (La. 1940).
Maryland	Md. Ann. Code art. 27 § 75(c) (1985 Supp.).
Massachusetts	Mass. Ann. Laws ch. 279, § 62 (Michie/Law Coop. 1984 Supp.).
Mississippi	Miss. Code Ann. § 99-19-57 (1985 Supp.). <u>See</u> <u>Billiot v. Mississippi</u> , No. 54, 960 (Miss. Oct. 30, 1985).
Missouri	Mo. Ann. Stat. § 552.060 (Vernon 1986 Supp.). <u>See Shaw v. State</u> , 686 S.W. 2d 513 (Mo. Ct. App. 1985).
Montana	Mont. Code Ann. § 46-14-103 <u>et seq.</u> (1983).
Nebraska	Neb. Rev. Stat. § 29-2537 <u>et seq.</u> (1979).
Nevada	Nev. Rev. Stat. § 176.425 <u>et seq.</u> (1983).
New Mexico	N.M. Stat. Ann. § 31-14-3 <u>et seq.</u> (1978).
New York	N.Y. Correct. Law § 654 <u>et seq.</u> (McKinney 1984).

North Carolina	N.C. Gen. Stat. § 15-A-1001 <u>et seq.</u> (1983).
Ohio	Ohio Rev. Code Ann. 2949.28 <u>et seq.</u> (Page 1982). <u>See In re Keaton</u> , 19 Ohio App. 2d 254, 250 N.E. 2d 901 (1969), vac'd and rem'd, 408 U.S. 936 (1972).
Oklahoma	Okla. Stat. Title 22 § 1004 <u>et seq.</u> (West 1983). <u>See Bingham v.</u> <u>State</u> , 82 Okla. Crim. 305, 169 P.2d 311 (Okla. Crim. App. 1946); <u>Hays</u> <u>v. Murphy</u> , 663 F.2d 1004 (10th Cir. 1981).
Pennsylvania	<u>Commonwealth v. Moon</u> , 383 Pa. 18, 117 A.2d 96 (Pa. 1955).
Rhode Island	R.I. Gen. Laws § 40.1-5.3-6 (1984).
South Carolina	S.C. Code Ann. § 44-23-210( (Law. Co-op. 1985).
South Dakota	S.D. Codified Laws Ann. § 23A-27A-21 (1979).
Tennessee	<u>Jordan v. State</u> , 124 Tenn. 81, 135 S.W. 327 (Tenn. 1911).
Texas	<u>Ex Parte Morris</u> , 96 Tex. Crim. 256, 257 S.W. 894 (Tex. Crim. App. 1924).

Utah	Utah Code Ann. § 77-15-1 <u>et seq.</u> (1982).
Virginia	Va. Code § 19.2-177 <u>et</u> <u>seq.</u> (1983). See <u>Snider</u> <u>v. Peyton</u> , 356 F.2d 626 (4th Cir. 1965).
Washington	<u>State v. Davis</u> , 6 Wash. 2d 696, 108 P.2d 641, 651 (Wash. 1940) (dictum); <u>State ex rel. Alfani v.</u> <u>Superior Court for Grays</u> <u>Harbor County</u> , 139 Wash. 125, 245 P. 929 (Wash. 1926); <u>State v. Nordstrom</u> , 21 Wash. 403, 58 P. 248 (Wash. 1899).
Wyoming	Wyo. Stat. § 7-13-901 <u>et</u> <u>seq.</u> (1985 Supp.).

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This Appendix differs slightly from the one submitted by amici on petition for a writ of certiorari.

TABLE COPY

CERTIFICATE OF SERVICE

I, Sanford L. Bohrer, a member of the Bar of this Court, certify that three copies of the foregoing Motion for Leave to File and Brief of the Office of the Capital Collateral Representative et al. as Amici Curiae were served this thirtieth day of January, 1986, by mail, postage prepaid, upon the following counsel:

Richard H. Burr III  
Assistant Public Defender  
Official of the Public Defender  
Fifteenth Judicial Circuit  
13th Floor Harvey Building  
224 Datura Street  
West Palm Beach, Florida 33401

Attorney for Petitioner

Joy Shearer  
Assistant Attorney General of the  
State of Florida  
Elisha Newton Diminick Building  
Suite 204  
1011 Georgia Avenue  
West Palm Beach, Florida 32301

Attorney for Respondent

Sanford L. Bohrer  
Sanford L. Bohrer